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No. 98-273

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

On Petition for Writ of Certiorari From the
Supreme Court of Pennsylvania,
No. 39 M.D. Appeal Docket 1998

REPLY BRIEF

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ARGUMENT

THE REQUIREMENTS OF PENNSYLVANIA ELECTION LAW UNDER 25 PA.C.S.A. §2872.1(3) ARE UNCONSTITUTIONAL AS PREVIOUSLY DETERMINED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

The restrictions within and perpetuated by the Pennsylvania Election Code 25 Pa.C.S.A. §2872.1(3) neither promote legitimate state interests nor establish state sovereignty. Rather such provisions can not and have not stood the test of constitutionality. This is clearly evidenced and supported by the federal 1979 decision in Elliott v. Shapp, in which the Court struck down the very same provision at issue in the matter at hand. Further, the legislative response to this issue was to remove the county signature requirement of subsection (1) dealing with the President and subsection (2) dealing with the United States Senate. Because the decision was unreported, and since it is on point, the text of the case follows in full. The full text is included to avoid any appearance of selective excerpts or interpretation. It must be noted that neither the Pennsylvania Courts nor the Respondent have chosen to acknowledge this decision or to further distinguish it or any other issues within Petition's brief. It is Petitioner's position that the decision in Elliott v. Shapp is dispositive.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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Appendix A

APPENDIX A: MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DATED MARCH 9, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK E. ELLIOTT, and STEPHEN BEECH, individually and on behalf of all other qualified voters similarly situated	
vs.	CIVIL ACTION NO. 76-1277
MILTON J. SHAPP, individually and as Governor of the State of Pennsylvania, and C. DELORES TUCKER, individually and as Secretary of Commonwealth of Pennsylvania	

MEMORANDUM

CAHN, J. March 9th, 1979

On October 28, 1976, this court issued an Order declaring part of the Pennsylvania Election Law, PA. STAT. ANN. tit. 25,

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§2872(a) (Purdon), unconstitutional.[1] The court further ordered that until the Pennsylvania legislature acted in accordance with its decision,

> [T]he names of candidates for statewide offices covered by 25 P.S. §2872(a) will be placed on the ballot upon the presentation of nomination petitions signed by one thousand registered and enrolled members of the proper party without respect to the county in which they reside.

On October 27, 1977, the court of appeals vacated the order and remanded the case to this court. Elliott v. Shapp, No. 77-1039 (3d

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[1]Section 2872(a) provides that:

> Number of signers required; nomination petition of candidates at primaries shall be signed
>
> (a) If for the office of President of the United States, or of United States Senator, by at least one hundred registered and enrolled members of the proper party in each of at least ten counties of the State.

Cir. Oct. 27, 1977).

Although the court of appeals did not address the merits of plaintiffs' challenge to the constitutionality of §2872(a), it did find that plaintiffs' cause of action was not barred by the mootness doctrine. Nevertheless, the court held that this court's decision had been premature and had deprived the defendants of an opportunity to develop a full record. That error has now been corrected. On November 21, 1977, the plaintiffs moved for summary judgment; thereafter, the defendants cross-moved for summary judgment. After the parties submitted numerous affidavits, the court heard oral argument on their motions. The case is therefore ripe for decision.

In their complaint, plaintiffs asked for a three-judge court. Since they initially sought injunctive relief, 28 U.S.C. §2281 would require disposition by a court of three judges.[2] As this court's order

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[2]Section 2281 provided that:

> An interlocutory or permanent injunction restraining the enforcement, operation or

of October 28, 1976,

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> execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Although §2281 was repealed in 1976, §7 of the repealing legislation expressly provided that "[t]his Act ... shall not apply to any action commenced on or before the date of enactment." Pub. L. 94-381, 90 Stat. 1119 (1976). Since Pub. L. 94-381 was enacted on August 12, 1976, and this action was filed on April 13, 1976, it is clear that §2281 applied to this case if the plaintiffs had not withdrawn their prayer for an injunction. (See infra).

demonstrates, the case (with an off-the-record concurrence of both counsel) was decided by a single judge without discussion of the three-judge court issue. In its October 27, 1977, order, the court of appeals noted that "[t]he disposition of the prayer in the complaint seeking a three-judge court is not before us." After the case was remanded to this court the plaintiffs at a formal hearing withdrew their prayer for injunctive relief. They believed that by so doing they would remove the case from the literal confines of §2281 and thus eliminate the need for convening a three-judge court. Redfearn v. Delaware Republican State Committee, 502 F.2d 1123, 1129 (3d Cir. 1974). However, in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court expressly left open the question of "[w]hether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court." 372 U.S. at 154. See Spencer v. Kugler, 454 F.2d 839 (3d Cir. 1972). This court must now determine whether §2281 mandates that the case, presently an action seeking only declaratory relief, should

nevertheless be decided by a court of three judges.[3]

The Supreme Court decided Mendoza-Martinez by examining whether trial before a single judge would frustrate the policy behind the three-judge court statute. Thus, the

Court reasoned that since the case involved a request for noncoercive relief and the order entered only declared the statute unconstitutional, failure to convene a three-judge court would not thwart the policy behind §2281.

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[3]Although in Redfearn v. Delaware Republican State Committee, 502 F.2d 1123, 1129 (3d Cir. 1974), Judge Gibbons wrote that "[i]f the plaintiff's withdraw their request for injunctive relief the case may proceed before a single judge," this statement may not be the law of this circuit. Not only was the statement dicta made without reference to or discussion of either Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), or Spencer v. Kugler, 454 F.2d 839 (3d Cir. 1972), but the panel was sharply divided on the resolution of of the three-judge court issue. [Ibid].

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A district court must study the facts of each case and apply the analysis developed by the Court in Mendoza-Martinez. At the present time the pleadings in the instant case, like those in Mendoza-Martinez, contain only a request for noncoercive declaratory relief.[4] Any order entered by this court will not contain injunctive sanctions.[5] Therefore, like the Court in Mendoza-Martinez, I find

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[4]Although the Court in Mendoza-Martinez noted that the plaintiff had never sought anything other than declaratory relief, the Court did not discuss how its decision would have differed if the plaintiff had initially sought injunctive relief and later withdrawn that request, leaving only a prayer for declaratory relief. Given the liberal amendment provisions of the Federal Rules of Civil Procedure, I find that I must decide the case on the basis of the complaint as amended. To hold otherwise would negate the liberality contemplated by those who drafted Rule 15. I will therefore treat this case as an action for declaratory relief. This result is consistent with the court of appeals' dictum in Redfearn v. Delaware Republican State Committee, 502 F. 2d 1123, 1129 (3d Cir. 1974).

[5]Notwithstanding that the case was filed "on behalf of all other qualified

that decision by one judge will not thwart the congressional policy underlying the three-judge court statute.[6] I will now examine the merits of this case.

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I hold that PA. STAT. ANN. tit. 25, §2872(a) (Purdon), is unconstitutional as applied in this case because it dilutes the franchise rights of some citizens of this Commonwealth and is not

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voters similarly situated," the plaintiffs never sought to have the case certified as a class action and no class was ever certified. Thus, my decision in this case binds only the named parties.

[6]Given that §7 of Pub. L. 94-381 also governs the application of 28 U.S.C. §2284, I need not decide whether that section, as amended by Pub. L. 94-381, would require a three-judge court if this action had been instituted after August 12, 1976. Under the law as it existed prior to August 12, 1976, only §2281 could have required the convening of a three-judge court to hear this case because §2284 as it existed then merely set forth the procedure to be followed in convening such a court.

justified by a compelling state interest. Moore v. Ogilvie, 394 U.S. 814 (1969); see, Reynolds v. Sims, 377 U.S. 533 (1964). My reasons for so holding are set forth in more detail in my Memorandum and Order of October 28, 1976, and need not be repeated here.[7] I only wish to expand on two points.

First, I find that the statute involved in this case has a negative impact on the franchise and warrants strict scrutiny under the equal protection clause of the Fourteenth Amendment. In this case the county allocation requirement which plaintiffs challenge is the direct cause of plaintiff Elliott's inability to get his name on the primary election ballot.[8] It is irrelevant that perhaps he could have

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[7]The portions of that Memorandum which address the merits of plaintiffs' complaint are incorporated by reference herein. For convenience a copy of that Memorandum is attached hereto as Exhibit "A". [Exhibit is not attached].

[8]Although plaintiff Elliott was a candidate in the primary election which prompted this action, plaintiff Beech is simply a registered voter, who claims that the statute in question abridged his right

complied with the statute had he tried harder. An election code which weights the franchise rights of residents of one county more heavily than those residents of another county denies the deprived voters equal protection

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of the laws.[9] Such weighting is precisely what the equal protection

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to vote. Indeed, he filed this action "individually and on behalf of all other qualified voters similarly situated." Therefore, it is proper for this court to rule on the issue of whether §2872 abridges a citizen's right to vote. Compare Bullock v. Carter, 405 U.S. 134 (1972), discussed in text infra.

[9]It is interesting to note that the Pennsylvania Supreme Court recognized this problem and expressly construed the Pennsylvania Constitution so as to avoid it. Article II, §16 of the Pennsylvania Constitution provides, inter alia, that "no county shall be divided unless entitled to two or more Senators.... No ward, borough, or township shall be divided in the formation of a district." To circumvent the argument that such reliance on local political units violated the equal protection clause of the Federal

Constitution as interpreted in Reynolds v. Sims, 377 U.S. 533 (1964), the Pennsylvania Supreme Court held that Article II, §16 required only

> [T]hat senatorial reapportionment legislation must maintain the integrity of counties and other political subdivisions, insofar as possible, and must provide for compact districts of contiguous territory, subject always to the overriding objective and mandate that such districts shall be 'as nearly equal in population as may be.'

Butcher v. Bloom, 415 Pa. 438, 463 (1964). The court

> [E]mphasize[d] that, if necessary, any political subdivision or subdivisions may be divided or combined in the formation of districts where the population principle cannot otherwise be satisfied. Furthermore, the number of senators per political subdivision may not be limited if such limitation violates the equal-population principle.

438 Pa. at 463-4 See also, Scranton v. Drew, 229 F.Supp. 310 (M.D. Pa.), vacated and remanded, 379 U.S. 40 (1964).

Thus, Pennsylvania's own courts have been concerned with the constitutional problems presented by county based allocation schemes. However, I do not think that the case presents an unsettled

clause was designed to prevent. Reynolds v. Sims,

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377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). Like the Illinois statute involved in Moore v. Ogilvie, 394 U.S. 814 (1969).

> This law ... discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which

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question of state law requiring a federal court to abstain from reaching a decision under the doctrine of Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). The statute in question here is clear, specific, and precise on its face; it does not lend itself to the kind of saving construction applied by the Pennsylvania Supreme Court in Butcher, which involved a more loosely worded provision of the state constitution. Moreover in ruling on the validity of plaintiff Elliott's nomination petition, the Pennsylvania Commonwealth Court gave the statute a literal construction. Nomination of Elliott, 362 A.2d 438 (Pa. Cmwlth. 1976). Thus, Pennsylvania courts have construed the statute, and there is no unsettled question of state law requiring this court to abstain from reaching a decision.

> the exercise of political rights is entitled under the Fourteenth Amendment.

394 U.S. at 819. Compare Udall v. Bowen, 419 F. Supp. 746 (S.D. Ind.), aff'd, 425 U.S. 947 (1976) (allocation based on congressional districts of approximately equal population held constitutional). Like the Supreme Court in Moore I have concluded that this statute has an adverse effect upon the franchise, and that it cannot withstand the strict scrutiny to which I must subject it.

Other authorities have suggested that the degree of impact on the franchise should always govern the standard of review in this type of case; Udall v. Bowen, 419 F.Supp. 746, 748-49 (S.D. Ind.), aff'd, 425 U.S. 947 (1976); Zautra v. Miller, 348 F.Supp. 847, 849-50. (D. Utah 1972). See Note, 50 TEMPLE L.Q. 911, 917-18 (1977). However, I respectfully decline to follow their analysis.[10]

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[10]The Commonwealth's argument that the Moore analysis should not be applied in this case because the impact on the franchise is more indirect in this case

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In Moore the Court made

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no distinction based on the degree of the burden that the statute placed on the franchise. Rather, the court examined whether the

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than in Moore is ingenious but without merit. The Commonwealth has urged that the Court applied strict scrutiny in Moore because an individual signature on a nominating petition for an independent candidate was precisely analogous to the casting of the vote in a primary election for one of the two established parties. Having held that a primary election was an integral part of the election process, the Court had to treat the signatures in Moore like votes cast in the primary election itself. However, the argument runs, this case is different because the signatures required by the statute involved in this case simply served to get an individual's name on the primary election ballot. Therefore, the Commonwealth urges that unlike the signatures in Moore, the signatures here are not analogous to the casting of a vote in the primary election itself. Although the Commonwealth is correct in asserting that there is a difference between Moore and the case at bar, I do not consider this difference material.

statute involved in that case burdened the franchise and, having found that it did, the Court found the statute unconstitutional. I must do likewise. Note, Representation on Party Committees, 88 YALE L.J. 167, 173 n. 26 (1978).

The Court's decision in Bullock v. Carter, 405 U.S. 134 (1972), does not require a different conclusion. In that case the Court analyzed the constitutionality of a Texas statute which required the payment of exorbitant fees before an individual could become a candidate for a primary election. In determining the standard of review to which it would subject the provision in question, the Court noted that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." 405 U.S. at 143 (citation omitted). However, the Court also noted that "Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast." Id. (footnotes omitted). Furthermore, the Court explained that the issue of the standard to be applied in the

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case before it was an open question only because "[t]he initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." 405 U.S. at 142-3 (footnote omitted). By contrast to Bullock, in this case I must pass on the constitutionality of a statute which dilutes the impact of the signatures of some voters directly. Unlike the statute

involved in Bullock, the statute in this case "quantitatively dilutes the votes that have been cast," and has a direct impact on the voters themselves. Since the case before me involves a situation expressly distinguished by the Bullock court, it cannot be covered by the decision in Bullock.[11]

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[11]Furthermore, even if I were to follow the Bullock reasoning, I would find that the statute in this case must pass strict scrutiny. Like the Texas filing fee in Bullock, the statute in this case

Second, the fact that this statute applies to primary elections and major party candidates rather than to general elections and independent candidates, does not affect the degree of scrutiny required. In Gray v. Sanders, 372 U.S. 368, 381 (1963), the Supreme Court announced the "one person one vote" rule and applied it to state conducted primary elections. Later, in Moore, the Court stated that "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." 394 U.S. at 818 (citations omitted). I find that the method of getting a candidate's name on the ballot is an integral part of the election process regardless of whether the candidate is a party member or an independent. I also find that the statute in question in this case

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institutes a scheme which "has a real and appreciable impact on the exercise of the franchise," 405 U.S. at 144, by giving voters in more densely populated counties less of a voice in the choosing of primary election candidates.

abridges the right to vote by diluting the impact of signatures of voters who reside in more heavily populated counties.

It is this dilution which makes the case sub judice comparable to the cases which held invalid similar

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county allocation requirements for independent candidates. See Communist Party of Illinois v. State Board of Elections, 518 F.2d 517 (7th Cir.), cert, denied, 423 U.S. 986 (1975); Socialist Labor Party v. Rhodes, 318 F.Supp. 1262 (S.D. Ohio 1970), aff'd 409 U.S. 942 (1972); Socialist Workers Party v. Rockefeller, 314 F.Supp. 984 (S.D. N.Y.), aff'd 400 U.S. 806 (1970); Socialist Workers Party v. Hare, 304 F.Supp. 534 (E.D. Mich. 1969). For most political candidates, having their name on the primary election ballot is a necessary predicate to winning a primary or general election. A statute which imposes a county distribution requirement as a prerequisite to a candidate's having his name placed on the

ballot, as does the statute at issue in this case, affects an integral part of the electoral process whether that candidate is a party member or an independent. This type of statute dilutes the impact of the signatures, or votes, of residents of larger counties and thus abridges their right to vote.

In my view the philosophy of Baker v. Carr, Reynolds v. Sims, and their progeny prohibit the dilution of the franchise rights of some voters by the institution of a county-based allocation system. Like the statute in Moore, §2872(a) burdens the franchise in an integral part of the electoral process and must be declared unconstitutional unless the Commonwealth can show that this abridgment is justified by the existence of a compelling state interest. The Commonwealth has not made this showing. As I explained in my Memorandum of October 28, 1976, the Commonwealth's legitimate desire to insure that a candidate has reasonable support can be accomplished by means which do not dilute the franchise rights of some voters. Moore v. Ogilvie, 394

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U.S. 814, 818-19 (1969). Thus there is no compelling state interest present to justify the abridgement of a fundamental right. Reynolds v. Sims, 377 U.S. 533 (1964).

I therefore grant the plaintiff's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and deny the defendants' cross-motion for summary judgment. An order will be entered accordingly.

Edward N. Cahn, J.

11.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK E. ELLIOTT, and STEPHEN BEECH, individually and on behalf of all other qualified voters similarly situated	:	
vs.	:	CIVIL ACTION NO. 76-1277
MILTON J. SHAPP,	:	

Appendix A

individually and as Governor :
of the State of :
Pennsylvania, and :
C. DELORES TUCKER, :
individually and as :
Secretary of Commonwealth :
of Pennsylvania :

ORDER

AND NOW, this 9 day of March, 1979, IT IS ORDERED that Richard Thornburg be substituted for Milton J. Shapp and Dr. Ethel Allen be substituted for C. Delores Tucker as defendants in this case pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment pursuant to Rule 56 is GRANTED and the defendants' cross-motion for summary judgment is DENIED. PA. STAT. ANN. tit 25, §2872(a) (Purdon) is hereby DECLARED UNCONSTITUTIONAL insofar as it requires that party members signing a nominating petition be residents of different counties.

Appendix A

BY THE COURT:

Edward N. Cahn, J.

Appendix B

APPENDIX B: PROOF OF SERVICE.

NO. 98-273

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

PROOF OF SERVICE

I, Philip J. Berg, Esquire hereby certify that copies of the foregoing Reply Brief were forwarded to the following persons, with first-class postage prepaid, by depositing the same in a United States post office or mailbox this 15th day of October, 1998, that said service is in accordance with Rule 28 of this court and that the persons listed constitute all parties required to be served:

Appendix B

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